

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

SHANNON CULL and CHRISTOPHER :
SCHLAUCH, As Parents and Natural :
Guardians and as Co-Administrators :
of the Estate of LANDYN SCHLAUCH, :
Deceased On Behalf of Said :
Decedent's Heirs-at-Law and :
Next-of-Kin, And in Their Own Right, :

Plaintiffs,

v.

UNITED STATES OF AMERICA,
AARON KELLEY, D.O., HAZLETON
GENERAL HOSPITAL,
NORTHEASTERN PENNSYLVANIA
HEALTH CORPORATION, and
GREATER HAZLETON HEALTH
ALLIANCE,

Defendants.

Civil No. 3:13-CV-1312

(Judge Kosik)

FILED
SCRANTON

JUL 24 2013

PER

DEPUTY CLERK

MEMORANDUM

Before the court is a Motion to Dismiss filed on behalf of the United States of America (Doc. 3). For the reasons which follow, the Motion to Dismiss will be granted and the action will be remanded to the Court of Common Pleas of Luzerne County.

BACKGROUND:

Plaintiffs instituted the instant medical malpractice action against several defendants in the Court of Common Pleas of Luzerne County. Two defendants named in the action, Cynthia Maczuga, M.D. and Freeland Health Center, have been deemed as federal employees by the United States¹ under §233 of the Federally Supported Health Center Assistance Act, 42 U.S.C. §233, thereby extending to them

¹ See, Doc. 1, Exhibit B; Doc. 4, Exhibits A and B.

the protections of the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. As the government points out in its brief, the Federal Tort Claims Act is the exclusive remedy against the United States for medical malpractice committed by Public Health Services employees acting within the scope of their duties.

The Federal Tort Claims Act acts as a limited and conditional waiver of the federal government's sovereign immunity by providing for consent to suit in federal district court. However, before filing suit against the United States pursuant to the Federal Tort Claims Act, a plaintiff must present an administrative claim to the responsible agency.

None of the parties dispute that defendants, Cynthia Maczuga, M.D. and Freeland Health Center, are deemed as federal employees, or that plaintiff's exclusive remedy is a Federal Tort Claims Act action against the United States. Nor do the parties dispute that plaintiffs have not exhausted their administrative remedies by filing a claim with the Department of Health and Human Services. In fact, in their response to the Motion to Dismiss, plaintiffs agree that the claims against the United States should be dismissed without prejudice and request that the remaining claims be severed and remanded to the Court of Common Pleas of Luzerne County.

We will grant the United States' Motion to Dismiss. Moreover, we will remand the remainder of the action to the Court of Common Pleas of Luzerne County. While defendants, Hazleton General Hospital, Greater Hazleton Health Alliance, and Northeastern Pennsylvania Health Corporation request that their cross-claims against the United States remain viable², a cross-claim may be asserted against the United States only when the government has waived its immunity from suit on that claim. See, Wright, Miller and Kane, Federal Practice and Procedure, §1431 and §1427; Rendon v. United States, 2001 WL 185516 (E.D. Pa. February 22, 2001).

² We note that the Answer and Cross-Claims alluded to by defendants, Hazelton General Hospital, Greater Hazelton Health Alliance, and Northeastern Pennsylvania Health Corporation are not contained in the instant record.

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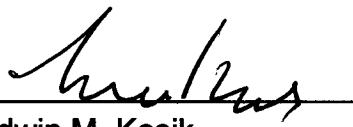
Civil No. 3:13-CV-1312

(Judge Kosik)

ORDER

AND NOW, this 24th day of July, 2013, IT IS HEREBY ORDERED
THAT:

- (1) The Motion to Dismiss filed by the United States (Doc. 3) is **GRANTED**;
- (2) The United States is **DISMISSED** as a party from this action;
- (3) All claims against the remaining defendants, Aaron Kelley, D.O., Hazleton General Hospital, Northeastern Pennsylvania Health Corporation, and Greater Hazleton Health Alliance are **REMANDED** to the Court of Common Pleas of Luzerne County, Pennsylvania; and
- (4) The Clerk of Court is directed to **CLOSE** this case.


Edwin M. Kosik
United States District Judge